Office-Supreme Court, U.S.
FILED
AUG 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-6045

In the Supreme Court of the United States

OCTOBER TERM, 1980

RUBIN KREINER, PETITIONER

v.

CHEMICAL CONSTRUCTION CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JOSHUA I. SCHWARTZ
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

CONSTANCE L. DUPRE
Acting General Counsel

PHILIP B. SKLOVER
Acting Associate General Counsel

VINCENT BLACKWOOD
Assistant General Counsel

SANDRA G. BRYAN
MARK S. FLYNN
Attorneys

Equal Employment Opportunity Commission
Washington, D.C. 20506

QUESTION PRESENTED

Whether a state agency's dismissal, upheld by a reviewing state appellate court under a sharply limited form of review, of an employment discrimination claim arising under the state law, has any preclusive effect in federal court adjudication of a Title VII employment discrimination claim based upon the same incident.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's invitation to the Solicitor General, at the petition stage, to file a brief expressing the views of the United States.

STATEMENT

Petitioner, a Jew who immigrated to this country from Poland in 1970, was employed in New York as an engineer by respondent, an international engineering and construction firm (Pet. 2; Br. in Opp. 2). He claims that he was discharged and was not rehired by respondent because of his religion and national origin (J.A. 55).

Acting pro se,[1] petitioner filed a charge of discrimination with the Equal Employment Opportunity Commis-

[1] Petitioner apparently acted pro se throughout the state and federal proceedings until he reached the court of appeals for the Second Circuit.

sion ("EEOC"), asserting that respondent had discriminated against him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a). As required by Title VII and its regulations,[2] the EEOC referred the charge to the appropriate state administrative agency, the New York State Division of Human Rights ("NYSHRD"), to consider whether respondent's actions violated the State's Human Rights Law, N.Y. Exec. Law § 296 (McKinney 1972 & Supp. 1972-1980) (J.A. 44, 55, 69).

Proceedings on the State Claim

The NYSHRD determined, after an investigation, that there was no probable cause to believe that respondent had violated the New York statute, embodying this conclusion in a cursory order (J.A. 13).[3] Petitioner pursued an administrative appeal to the State Human Rights Appeal Board, which concluded, on review of the record, that the NYSHRD's determination was "not arbitrary, capricious or an abuse of discretion" (J.A. 15). Attached to the order of the Appeal Board was a notice stating that petitioner could obtain judicial review by filing a petition in the appropriate Appellate Division of the New York Supreme Court (J.A. 17). Petitioner sought to have the Appellate Division of the New York Supreme Court set aside the order of the Appeal Board pursuant to N.Y. Exec. Law § 298 (McKinney Supp. 1972-1980) and N.Y. Civ. Prac. Law art. 78 (McKinney 1981). After a review of the administrative record, the Appellate Division "confirmed" the order of the Appeal Board without opinion (J.A. 25-26).

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[2] 42 U.S.C. 2000e-5(c); 29 C.F.R. 1601.12(a) and (b)(1) (1976); 29 C.F.R. 1601.13(c) and (d) (1980); 29 C.F.R. 1601.13(a)(4)(i) and (a)(5), at 45 Fed. Reg. 81040 (1980) (interim rule). See *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).

[3] The NYSHRD apparently conducted no hearing, did not otherwise take testimony (Br. in Opp. 4-5), and entered only skeletal and incomplete findings in support of its decision to terminate proceedings on petitioner's claim at the threshold (see J.A. 13).

Proceedings on the Federal Claim

As required by statute and regulation,[4] the EEOC accorded "substantial weight" to the findings of the NYSHRD when they became final upon confirmation by the Appellate Division.[5] Based on the NYSHRD's findings and the record, the District Director of the EEOC determined that there was no reasonable cause to believe that Title VII had been violated (J.A. 27). The District Director issued petitioner a right-to-sue letter, informing petitioner that he was entitled to bring his Title VII claim in federal court (J.A. 29-33).

Petitioner then filed this action in the United States District Court for the Southern District of New York, asserting a claim under Title VII (J.A. 36-38). Respondent moved to dismiss the complaint under Fed. R. Civ. P. 12(b) or, alternatively, for summary judgment under Fed. R. Civ. P. 56 on the ground of res judicata. The district court denied the motion (J.A. 43-52). Thereafter, in an unrelated case, *Sinicropi* v. *Nassau County*, 601 F.2d 60, 62, cert. denied, 444 U.S. 983 (1979), the United States Court of Appeals for the Second Circuit held that the doctrine of res judicata bars adjudication of a Title VII claim in federal court following adjudication of a state discrimination claim by a state administrative agency and review of the administrative record by a state appellate court.[6] Following the

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[4] 42 U.S.C. 2000e-5(b); 29 C.F.R. 1601.21(e) (1978 & 1980).

[5] Petitioner had, on at least one occasion, sought to renew EEOC proceedings prior to the decision of the Appellate Division (J.A. 18-22).

[6] The court of appeals' brief per curiam opinion in *Sinicropi* relied solely upon *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977), an employment discrimination case arising under 42 U.S.C. 1981. In *Mitchell*, the court of appeals reasoned that the issue raised by the Section 1981 claim was identical to that presented to the NYSHRD (553 F.2d at 269-270), and that the state agency proceeding afforded an "adjudicatory process com-

decision in *Sinicropi*, respondent renewed its motion to dismiss petitioner's complaint. This time the district court reluctantly granted respondent's motion, observing that "*Sinicropi* permits no choice but to dismiss plaintiff's complaint * * * on grounds of res judicata" (J.A. 59), but set forth at length (*id.* at 60-67) its view that *Sinicropi* was inconsistent with the policy of Title VII and this Court's decisions thereunder and had been wrongly decided.

The court of appeals affirmed, without discussing the merits of the *Sinicropi* rule, deeming itself unauthorized to reconsider *Sinicropi* without sitting en banc (J.A. 71-73) and holding that *Sinicropi* was to be applied retroactively to the instant case.[7] A petition for rehearing, with a suggestion for en banc consideration, was denied with two judges dissenting (J.A. 79-80).

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parable" to federal court adjudication. The court concluded that the NYSHRD's probable cause determination was analogous to the summary judgment procedure in federal courts, based upon the belief that the NYSHRD was required to resolve all factual questions in favor of the complainant at this juncture (*id.* at 270-271). The court concluded further that, under 28 U.S.C. 1738, the affirmance of the NYSHRD's decision adverse to the claimant by the New York Appellate Division created a res judicata bar to the federal court action, notwithstanding the limited scope of judicial review exercised. 553 F.2d at 271-277. The *Mitchell* panel disclaimed any view on whether preclusion would be required in a Title VII case (*id.* at 275 n.13) in response to Judge Feinberg's dissent (*id.* at 277-280) stressing the inconsistency he perceived between the result and the policy of Title VII. The *Sinicropi* panel, however, could "see no reason to distinguish between section 1981 and Title VII for res judicata purposes." 601 F.2d at 62. Judge Feinberg, a member of the *Sinicropi* panel as well, joined the panel's opinion, noting that he would reach the opposite result "if the slate were clean." *Ibid.*

[7] This Court excluded from the grant of certiorari the question whether retroactive application of *Sinicropi* was proper. Certiorari had been denied in *Sinicropi* itself prior to the emergence of a clear conflict among the circuits as to the preclusive effect of a state court affirmance of an adverse state agency ruling in a subsequent Title VII action in federal court.

SUMMARY OF ARGUMENT

In enacting Title VII of the Civil Rights Act of 1964, Congress deliberately secured the right of adjudication in federal court to individuals claiming to be aggrieved by unlawful employment discrimination. This Court has repeatedly concluded that this right is neither forfeited nor diminished by an aggrieved individual's resort to alternative remedies and forums empowered under state or federal law, or under private agreements, to redress employment discrimination. The decision of the court of appeals accordingly creates a unique exception to the protection afforded by Title VII.

In Title VII Congress defined the relationship between state proceedings and Title VII proceedings, by providing that the findings of state fair employment authorities must be given substantial—but no greater—weight by the EEOC. 42 U.S.C. 2000e-5(b). And this Court has held that Congress declined to bind the federal district courts with the conclusions reached by the EEOC under this standard, affirming, instead, that adjudication in federal court is to be de novo. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 799 (1973). Accordingly, the court of appeals erred in giving preclusive effect to the decision of state authorities, applying state law, in this case.

The fact that petitioner sought judicial review of the state agency decision in state court should not alter the outcome here. The special proceeding initiated by petitioner was an integral part of the state remedial procedure. Moreover, although petitioner's resort to state court review was not required by Title VII, it was fully consistent with the policy of Title VII, favoring full use of available state remedies. No principled distinction can be drawn between the circumstances of this case, and cases in which an employer initiates judicial review of a state agency decision.

Neither 28 U.S.C. 1738 nor any judge-made preclusion doctrine justifies the result reached by the court of ap-

peals. Two of the well-established exceptions to the preclusion doctrines are applicable here. First, the exceedingly limited state proceedings, in which conflicting factual contentions were resolved adversely to petitioner although no hearing had been held, do not constitute a full or fair adjudication of petitioner's rights. Second, the unique policy adopted by Congress in Title VII, providing for parallel and overlapping remedies, bars application of preclusion doctrines. The interests of federal-state comity would not be advanced by the rule adopted by the court of appeals. Under that rule any well-advised claimant would limit resort to state proceedings to the bare minimum required by law. Individuals who are not so advised will, in ignorance, forfeit their rights under federal law. Thus, unless Congress should decide to alter the carefully crafted enforcement scheme of Title VII, petitioner is entitled to full adjudication of his Title VII claim in federal court.

ARGUMENT

PETITIONER IS ENTITLED TO DE NOVO FEDERAL COURT ADJUDICATION OF HIS CLAIM OF EMPLOYMENT DISCRIMINATION UNDER TITLE VII

A. Title VII Allows an Aggrieved Individual to Pursue Rights Under Other State and Federal Laws Without Sacrificing His Right to Adjudication of His Title VII Claim in Federal Court

1. In enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) 2000e *et seq.*, Congress not only created a statutory right to be free of invidious discrimination in employment, but also created a comprehensive scheme for the vindication of that right. *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63 (1980); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 457-459 (1975). "[D]esigned to supplement, rather than supplant, existing laws and institutions relating to employment discrimination," *Alexander* v. *Gardner-Denver Co.*,

415 U.S. 36, 48-49 (1974), Title VII "provides for consideration of employment-discrimination claims in several forums": state and federal, administrative and judicial. *Id.* at 47.

Under the scheme created by Congress, whenever an incident of alleged employment discrimination occurs in a state or locality which by law prohibits such discrimination and which has established an "authority to grant or seek relief from such [discrimination] or to institute criminal proceedings with respect thereto," no charge of discrimination may be actively processed by the EEOC until the local remedy has been invoked and at least 60 days have passed thereafter, or the local proceedings have terminated, whichever comes sooner. 42 U.S.C. 2000e-5(c).[8] After providing the appropriate state agency an opportunity to resolve the complaint, an aggrieved individual may press his complaint before the EEOC (see note 8, *supra*). The Commission conducts an investigation to determine whether there is reasonable cause to believe that the charge of employment discrimination is true. 42 U.S.C. 2000e-5(b). In this investigation the Commission is required to "accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law" pursuant to the deferral requirement of 42 U.S.C. 2000e-5(c) and 2000e-5(b), but is not bound by such findings. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 48 n.8. If the EEOC finds reasonable cause to believe that unlawful discrimination has occurred, it undertakes conciliation efforts to eliminate the unlawful practice. 42 U.S.C. 2000e-5(b). If these efforts fail, the Commission may elect to bring a civil action to enforce the Act. If the Commission declines to do so, or if the Commission finds no reasonable

[8] The EEOC may accept employment discrimination charges prior to this time, referring them to the appropriate state authority, if any, on behalf of the complainant, and deferring further action to allow the state authority an opportunity to resolve the dispute. *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).

cause to believe that a violation has occurred, it must issue a "right to sue" letter alerting the aggrieved party to his right to commence a civil action to obtain an adjudication of his rights. 42 U.S.C. 2000e-5(f)(1). Thus, it is only after state authorities, acting under any pertinent state law, and the EEOC have had an opportunity to investigate and act upon a claim of employment discrimination that a civil action under Title VII may be commenced in district court.

2. In a series of decisions this Court has considered the relationship between various kinds of proceedings, which may provide redress for employment discrimination, and the civil action in federal court which is the ultimate remedy established by Title VII. The Court has invariably concluded that "submission of a claim to one forum does not preclude a later submission to another." *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 47-48 & n.8. Under the rationale of these decisions, we submit, the holding of the court of appeals in the instant case is irreconcilable with the fundamental purpose and design of Title VII.

In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-799 (1973), the Court specified that neither the EEOC's failure to find reasonable cause supporting a complaint nor an EEOC finding of no reasonable cause bars a civil action in federal court. In reaching this conclusion, the Court stressed that EEOC procedures do not match those in adversarial judicial proceedings, and that Congress intended civil actions under Title VII to be de novo proceedings. *Ibid.* Similarly, the Court has concluded that the right to de novo adjudication of a Title VII claim is not foreclosed by submission of a claim on the complainant's behalf to final arbitration under the anti-discrimination provision of a collective bargaining agreement, noting that Congress intended to allow "parallel or overlapping remedies against discrimination * * *." *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 47. And the Court there specifically rejected

the application of any doctrine of preclusion as a bar to de novo adjudication in federal court, stating (*id.* at 49 n.10):

> The policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel.

Moreover, notwithstanding the fact that the right established by the collective bargaining agreement in issue was "facially similar" to that secured by Title VII, the Court concluded the disparity between the informal procedures available in arbitration and those available in federal court under Title VII made any form of deference to the arbitrator's decision unwarranted. *Id.* at 56-59.

These principles have been applied in a variety of settings. The Court underscored that Title VII provides a remedy independent of other avenues for redressing employment discrimination, notwithstanding any duplication created by this arrangement, in holding that the filing of a timely complaint with the EEOC under Title VII does not toll the statute of limitations on a racial discrimination in employment claim filed under 42 U.S.C. 1981. *Johnson* v. *Railway Express Agency*, *supra*, 421 U.S. at 459-461. In *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), the Court concluded that aggrieved federal employees have a right to trial de novo in federal court upon their claims of employment discrimination under Title VII, notwithstanding any prior administrative proceeding, rejecting the contention that judicial review of the administrative record could satisfy the mandate of Title VII.[9]

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[9] Similarly, it has been held that the right to a trial de novo on Title VII claims is not foreclosed by a prior judgment under the Railway Labor Act, *Norman* v. *Missouri Pacific R.R.*, 414 F.2d 73, 75 n.2, 84 (8th Cir. 1969), cited with approval in *Chandler* v. *Roudebush*, *supra*, 425 U.S. at 845, or under the National Labor

Finally, only last Term, this Court reiterated that "the 'ultimate authority' to secure compliance with Title VII resides in the federal courts." *New York Gaslight Club, Inc.* v. *Carey, supra*, 447 U.S. at 64. The New York procedure employed by petitioner in the instant case was also employed by the complainant in *Carey*. Carey had filed a charge with the EEOC, which was referred to the New York State Division of Human Rights. The NYSHRD found for Carey, however, and ordered back pay and injunctive relief. The New York Gaslight Club appealed to the state's Human Rights Appeal Board, which confirmed the Division's decision; the Club then brought a special proceeding for review of the Division's decision in the Appellate Division of the New York Supreme Court, which in turn "confirmed" the Division's decision. *State Division of Human Rights ex rel. Speller* v. *New York State Drug Abuse Control Commission*, 59 A.D. 2d 852, 399 N.Y.S.2d 158 (1977). By the time Carey's Title VII claim was considered by the district court, she had been awarded all of the relief she had claimed, through the state proceedings, except for attorney's fees. The Court held that Title VII authorizes a federal court to award attorney's fees for legal representation in the state administrative and judicial proceedings, observing that (447 U.S. at 67-68; emphasis added):

> Title VII explicitly leaves the States free, and indeed encourages them, to exercise their regulatory power over discriminatory employment practices. *Title VII merely provides a supplemental right to sue in federal court if satisfactory relief is not obtained in state forums.* § 706(f)(1) [42 U.S.C. 2000e-5(f)(1)]. One aspect of complete relief is an award of attorney's fees, which Congress considered

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Relations Act, 29 U.S.C. 151 *et seq.*, *Taylor* v. *Armco Steel Corp.*, 429 F.2d 498, 499 (5th Cir. 1970). Likewise, decisions of administrative agencies under other statutes do not preclude de novo judicial consideration of Title VII claims. *E.g.*, *Tipler* v. *E.I. duPont deNemours & Co.*, 443 F.2d 125, 128-130 (6th Cir. 1971) (decision by the NLRB); *Garner* v. *Giarrusso*, 571 F.2d 1330, 1336-1338 (5th Cir. 1978) (decision by a local Civil Service Commission).

necessary for the fulfillment of federal goals. Provision of a federal award of attorney's fees is not different from any other aspect of the ultimate authority of federal courts to enforce Title VII. For example, if state proceedings result in an injunction in favor of the complainant, but no award for backpay because state law does not authorize it, the complainant may proceed in federal court to "supplement" the state remedy.

3. In the foregoing cases the Court has examined the relationship between a civil action under Title VII and almost all of the conceivable forms of proceedings to redress employment discrimination, including both those specifically contemplated by Title VII and those which are entirely independent of Title VII. In each instance, the Court has concluded that the ultimate right to trial of employment discrimination claims in federal court afforded by Title VII is unimpaired by resort to any prior proceeding or alternate remedy. The decision below thus creates a unique gap in the remedy conferred by Title VII, in contravention of the carefully crafted enforcement scheme and the congressional policy embodied therein.

By providing in 42 U.S.C. 2000e-5(b) that the EEOC must give substantial weight—but not preclusive effect (see *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 48 n.8)—to final findings by a state authority to which a discrimination complaint has been submitted, Congress necessarily indicated that a final determination in state employment discrimination proceedings, even if upheld upon judicial review, cannot bar the right to full adjudication in federal court of an aggrieved individual's Title VII claim. For, as the courts of appeals have generally recognized, it would be anomalous to hold that federal courts, endowed with "ultimate authority" to enforce Title VII, *id.* at 45, through de novo review of all claims, must bow to state determinations, while the EEOC need not do so. See *Smouse* v. *General Electric Co.*, 626 F.2d 333, 335 (3d Cir. 1980); *Gunther* v. *Iowa State*

Men's Reformatory, 612 F.2d 1079, 1084 n.6 (8th Cir.), cert. denied, 446 U.S. 966 (1980); see also *Garner* v. *Giarrusso*, 571 F.2d 1330, 1337 (5th Cir. 1978); *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447, 450 & n.1 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975); *Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9, 12 (6th Cir. 1972). Such a requirement for deference by the federal courts would also render Section 706(f) of the Act, 42 U.S.C. 2000e-5(f), providing for investigation and conciliation efforts by the EEOC, meaningless in such cases—for the EEOC has no enforcement powers and would be unable to resolve a complaint rejected by state authorities through conciliation if the respondent knew that no remedy was available in federal court. See *Batiste* v. *Furnco Construction Corp.*, *supra*, 503 F.2d at 450 n.1.

4. The court of appeals deemed the considerations outlined above inapplicable here, as in *Sinicropi*, *supra*, 601 F.2d at 62, on the ground that the petitioner here sought judicial review of the decision of the NYSHRD. This distinction was predicated upon the court's view that Title VII, 42 U.S.C. 2000e-5(c), requires only deferral to state administrative proceedings.[10] But the fact that Title VII does not necessarily require resort to state judicial proceedings[11] is immaterial for, although Congress mandated only a 60-day deferral to state proceedings, it intended "to encourage *full use* of state remedies." *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S.

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[10] The court stated in *Mitchell* v. *National Broadcasting Co.*, *supra* (see note 6, *supra*), 553 F.2d at 275-276, that "[t]he deferral requirements of Title VII do not contemplate resort to state judicial review." But see pages 13-14 and note 13, *infra*.

[11] While the New York State fair employment procedures would permit a complainant to satisfy deferral requirements without resort to a judicial forum, this is not always the case. See, *e.g.*, *White* v. *Dallas Independent School District*, 581 F.2d 556, 559, 561 (5th Cir. 1978) (en banc), holding that Title VII requires deferral to local prosecutors authorized under Texas law to institute criminal proceedings.

at 66 n.6 (emphasis added). Thus, the fact that a complainant may be able to satisfy Title VII's deferral requirement without going into state court does not mean that Congress' intent that Title VII "supplement, rather than supplant, existing laws and institutions relating to employment discrimination," *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 48-49, would be served by a rule requiring a complainant to forgo all review of the dismissal of his state claim lest he foreclose opportunity to secure trial of his Title VII claim in federal court. Compare *Allen* v. *McCurry*, No. 79-935 (Dec. 9, 1980), slip op. 14 n.23. Indeed, Title VII itself makes no distinction between state administrative and state judicial proceedings—either in its provisions requiring deferral to "a State or local authority [authorized] to grant or seek relief from such practice or to institute criminal proceedings with respect thereto" (42 U.S.C 2000e-5(c) and (d)), or in its provision that "the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section" (42 U.S.C. 2000e-5(b)). And, as previously noted (pages 7 and 11, *supra*), the latter provision requires the Commission to afford substantial weight—but not preclusive effect—to the state tribunal's findings.

Moreover, the limited judicial review petitioner secured in state court in this case is an integral part of the remedial scheme established by New York to address claims of employment discrimination. Thus, in *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S. at 68 (emphasis added), the Court explained that "[t]he New York state procedure, to which respondent's charge was referred, provides for adversary quasi-judicial hearings leading to findings of fact,[12] administrative appeals, and *judicial*

[12] No such hearing was afforded to petitioner, however. See page 2 note 3, *supra*, and page 15, *infra*.

review." [13] Stressing "the statute's structure of cooperation between federal and state enforcement authorities," the Court refused to distinguish, for the purpose of fee awards, between administrative and judicial proceedings or between state and federal proceedings (*id.* at 61-62), remarking, without qualification, that "Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination." *Id.* at 65.

Indeed, if the petitioner had prevailed in the state administrative proceedings, as did the complainant in *Carey*, petitioner would have had compelling reason to defend that result had the employer sought state court review, again as in *Carey*, lest the administrative findings be set aside upon his default. To give preclusive effect in federal court to the state court judgment in such circumstances would, obviously, eviscerate Title VII. Although the Court of Appeals for the Second Circuit has reserved judgment on whether the outcome of state judicial review initiated by the adverse party should be given preclusive effect in subsequent Title VII proceedings in federal court, *Mitchell* v. *National Broadcasting Co.*, *supra*, 553 F.2d at 275 n.13, other courts which have considered the question regard such a distinction as untenable, see *Unger* v. *Consolidated Foods Corp.*, Nos. 80-2792 & 80-2844 (7th Cir. Aug. 14, 1981), slip op. 7; *Smouse* v. *General Electric Co.*, *supra*, 626 F.2d at 336; *Gunther* v. *Iowa Men's Reformatory*, *supra*, 612 F.2d at 1084 n.6, and it is without support in the structure or language of Title VII. Cf. *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S. at 61-62. Moreover, it is doubtful that the preclusion doctrines or 28 U.S.C. 1738 would permit

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[13] The Court characterized the question presented in *New York Gaslight Club, Inc.*, *supra*, 447 U.S. at 56 (second emphasis added),

> whether, under Title VII of the Civil Rights Act of 1964, a federal court may allow the prevailing party attorney's fees for legal services performed in prosecuting an employment discrimination claim in *State* administrative *and judicial* proceedings that Title VII requires federal claimants to invoke.

such a distinction. See *Allen* v. *McCurry*, *supra*, slip op. 14.

5. The court of appeals' decision has the impermissible effect of depriving petitioner of his right to adjudicate his Title VII claim in federal court by assigning "primary adjudicative responsibility" to an administrative agency subject only to limited judicial review—the very result rejected in *Chandler* v. *Roudebush*, *supra*, 425 U.S. at 853, 863, and in *McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 798-799. As the district court noted (J.A. 60-61), petitioner has never had an adjudication of his claim in any way comparable to the trial of Title VII claims afforded by the federal district courts. The NYSHRD conducted no hearing and took no testimony. Under New York law neither was required prior to entry of a determination of whether there was probable cause to believe that a violation had occurred. N.Y. Exec. Law § 297(2) and 297(4)(a) (McKinney Supp. 1972-1980).[14] The Division of Human Rights was nonetheless empowered to resolve the factual dispute between petitioner and respondent (compare Pet. 2 with Br. in Opp. 2) adversely to petitioner, *State Division of Human Rights ex rel. Speller* v. *New York State Drug Abuse Control Commission*, 59 A.D.2d 332, 335-338, 399 N.Y.S.2d 541, 543-545 (1977),[15] and did so. Nor did the Division of Human

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[14] Even if a hearing had been held, compliance with the rules of evidence would not have been required. N.Y. Exec. Law § 297(4)(a) (McKinney Supp. 1972-1980); compare *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 57.

[15] In *Mitchell* v. *National Broadcasting Co.*, *supra*, 553 F.2d at 270-271, the Second Circuit considered the procedures employed by the NYSHRD adequate, citing *Mayo* v. *Hopeman Lumber & Mfg. Co.*, 33 A.D.2d 310, 313, 307 N.Y.S.2d 691, 695 (1970), for the proposition that "[b]efore the State Division may dismiss a complaint of discrimination for lack of probable cause, "it must appear virtually that as a matter of law the complaint lacks merit,'" and concluding that the "adjudication of no probable cause * * * represents a finding that, assuming the allegations of the complaint to be true, nonetheless as a matter of law the

Rights enter specific finding of fact and conclusions of law (see J.A. 13). Thus, as the district court observed (J.A. 60-61), the court of appeals' analogy (see note 6, *supra*) between the proceedings of the NYSHRD and summary judgment procedures in federal court is fundamentally flawed. Like arbitration, the New York administrative procedure is "an efficient, inexpensive, and expeditious means for dispute resolution," *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 58; these very characteristics make it a "less appropriate forum for final resolution of Title VII issues than the federal courts" (*ibid.*; footnote omitted).

None of the shortcomings of the administrative process was remedied by the administrative appeal taken by petitioner. The Human Rights Appeal Board held no evidentiary hearing and took no evidence. Rather, the Board simply reviewed the record compiled by the Division of Human Rights and, reciting the words of the pertinent statute, upheld the Division's order as not "arbitrary, capricious or an abuse of discretion" (J.A. 15; see N.Y. Exec. Law § 297-a(7)(e) (McKinney 1972). No more searching review is permitted by the governing statute. See N.Y. Exec. Law § 297-a(7) (McKinney 1972).

Finally, contrary to the view expressed by the court of appeals,[16] judicial review of the NYSHRD's decision by the Appellate Division of the Supreme Court does not complete a full adjudication of petitioner's rights. Like the Human Rights Appeal Board, the Appellate Division merely reviews the record. As in any appellate proceeding, conten-

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discharge * * * did not amount to a discriminatory act." However, the Appellate Division's subsequent decision in *Speller*, *supra*, 59 A.D.2d at 335-338, 399 N.Y.S.2d at 543-545, clarified the New York procedure, retreating from the broad sweep of *Mayo*, and making it clear that factual disputes may be resolved adversely to the complainant without holding a hearing.

[16] See *Mitchell* v. *National Broadcasting Co.*, *supra*, 553 F.2d at 272.

tions not pressed below ordinarily may not be raised. The scope of review is strictly limited. N.Y. Exec. Law § 298 (McKinney Supp. 1972-1980); N.Y. Civ. Prac. Law § 7803 (McKinney 1981).[17] The Appellate Division did not enter and could not enter any findings or conclusions or otherwise resolve the conflicting contentions of the parties, nor did the court conclude that material facts were not in dispute. As the Court of Appeals for the Third Circuit observed with respect to Pennsylvania procedures for consideration of employment discrimination claims, analogous in pertinent respect to the New York procedure:

> Because of this narrow scope of review and because many of the procedural limitations of the P[ennsylvania] H[uman] R[elations] C[ommission] are imposed by the legislature and the courts, the procedural difficulties we have noted will not be corrected by appellate review.

Smouse v. *General Electric Co.*, *supra*, 626 F.2d at 336.[18]

The state determination to which the court of appeals gave preclusive effect thus failed to provide petitioner with any of the basic elements of the adjudication afforded by Title VII. No evidentiary hearing has ever been held, and the only findings and conclusions ever entered are the conclusory comments entered by the NYSHRD (J.A. 13). Petitioner has not even had the

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[17] Under Article 78, the only relevant issue that could be raised was whether the NYSHRD's decision was arbitrary, capricious, an abuse of discretion or procedurally defective. N.Y. Civ. Prac. Law § 7803(3) (McKinney 1981). Substantial evidence review was not authorized because no hearing was held, or required to be held, by the NYSHRD. N.Y. Civ. Prac. Law § 7803(4) (McKinney 1981). Under § 298 of the New York Executive Law, "[t]he findings of facts on which * * * [the NYSHRD's] order is based shall be conclusive if supported by sufficient evidence on the record considered as a whole."

[18] The state procedures afforded to the complainant in *Smouse* appear to have been fuller than those afforded to petitioner in the instant case, and included a hearing. 626 F.2d at 334.

full "agency adjudication" subject to "review on a substantial evidence basis" in an appellate court which this Court held insufficient to satisfy the requirements of Title VII in *Chandler* v. *Roudebush*, *supra*, 425 U.S. at 853, 864. Indeed, in *Chandler* the administrative determination was of the Title VII claim itself, under a system providing substantially greater procedural safeguards than petitioner enjoyed here. Yet this Court held the complainant entitled to a trial de novo in federal court, primarily on the ground that Congress intended federal employees to have the same right as other Title VII complainants to an adjudication in federal court. 425 U.S. at 853, 863. To hold petitioner entitled to less would thus be inconsistent with *Chandler* and the congressional intent it reflects (since a federal employee who, like petitioner, sought to invoke his Title VII remedy would not be required to initiate state processes at all; see 42 U.S.C. 2000e-16(d); see also *Brown* v. *General Services Administration*, 425 U.S. 820 (1976)).

The decision of the court of appeals is accordingly inconsistent with the provisions of Title VII, as interpreted by this Court.

B. Neither General Principles of Preclusion Nor 28 U.S.C. 1738 Bars Adjudication of Petitioner's Title VII Claim

The court of appeals reasoned that, inasmuch as the Appellate Division's disposition of petitioner's state law action is treated as final under New York law,[19] the

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[19] A final decision in proceedings under New York's Human Rights Law purportedly precludes "any other action, civil or criminal, based upon the same grievance of the individual concerned." N.Y. Exec. Law § 300 (McKinney 1972). Under the New York law, an aggrieved individual must choose between recourse to the administrative procedure established and ancillary judicial review thereof on the one hand, and a plenary civil action on his state law claims, on the other, N.Y. Exec. Law §§ 297(9) and 300 (McKinney 1972 & Supp. 1972-1980).

state court judgment must likewise be honored by a federal district court hearing a Title VII claim, pursuant to common law preclusion principles and 28 U.S.C. 1738. J.A. 70-73; *Mitchell* v. *National Broadcasting Co.*, *supra*, 553 F.2d at 274-277; *Sinicropi* v. *Nassau County*, *supra*, 601 F.2d at 61-62. This conclusion overlooks well established limitations on the preclusion doctrines and 28 U.S.C. 1738.[20]

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[20] The preclusion doctrines include both res judicata (claim preclusion or "bar" and "merger") and collateral estoppel (issue preclusion). The term res judicata, however, is sometimes used to denote both forms of preclusion. *Allen* v. *McCurry*, *supra*, slip op. 4 & n.5. Although the court of appeals and the district court referred exclusively to "res judicata," application of that doctrine in its more precise sense would be especially inappropriate here. Res judicata traditionally bars litigation of an issue that was or could have been litigated as part of a previously determined cause of action. *Ibid.*; *Montana* v. *United States*, 440 U.S. 147, 153 (1979). Here petitioner's Title VII claim was not before the NYSHRD (see J.A. 9, 13) nor could it have been. The NYSHRD is empowered only to investigate and pass on complaints alleging violations of the New York Human Rights Law, see N.Y. Exec. Law § 295(6) (McKinney 1972), which, as it happens, considerably antedates enactment of Title VII. (Authorities in other states, like the NYSHRD, commonly have jurisdiction only over claims resting on state law. Cf. *Gunther* v. *Iowa State Men's Reformatory*, *supra*, 612 F.2d at 1084 n.5). The Human Rights Appeal Board and the Appellate Division sat only to review the NYSHRD's determination and therefore were equally unauthorized to consider petitioner's Title VII claim. Even if the state agency or the Appellate Division had been vested with jurisdiction to consider petitioner's Title VII claim under state law, as explained in our brief as amicus curiae (at 11-15) in *Minnick* v. *California Department of Corrections*, No. 79-1213 (June 1, 1981), previously provided to the parties in this case, Title VII itself limits jurisdiction to the federal courts. The Court dismissed the writ of certiorari and accordingly did not decide this question in *Minnick*.

If we assume that res judicata in its narrow sense cannot apply in this case, the question remains whether findings entered in a state adjudication have any collateral estoppel effect on a Title VII claim in federal court. For the reasons stated in the text we submit that collateral estoppel may not be applied in the circumstances of this case.

28 U.S.C. 1738 provides, in relevant part:

> The * * * judicial proceedings of any court of any such State * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * *.

This provision requires federal courts to give effect to the judgments of state courts. However, the Court has regarded Section 1738 as invoking the common law preclusion doctrines, subject to the full panoply of established exceptions thereto, rather than establishing any "more stringent" doctrine. *Allen* v. *McCurry*, *supra*, slip op. 3 n.2, 5 n.7, 6, 15 & n.25. The Court has recognized that, notwithstanding the preclusion doctrines, "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation," *Montana* v. *United States*, *supra*, 440 U.S. at 164 n.11; *Allen* v. *McCurry*, *supra*, slip op. 5, and that special circumstances, including countervailing statutory policies, may also warrant an exception to the normal rules of preclusion. *Montana* v. *United States*, *supra*, 440 U.S. at 155; *Brown* v. *Felsen*, 442 U.S. 127, 139 n.10 (1979); compare *Allen* v. *McCurry*, *supra*, slip op. 7-11. Both of these exceptions to the preclusion doctrines are fully applicable to this case.

As is described above, pages 2 note 3 and 15, petitioner was not allowed a full and fair opportunity to litigate his Title VII claim. The procedures afforded to petitioner simply bear no resemblance to those which Congress deemed appropriate and necessary for the enforcement of Title VII. See *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 57-59; *McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 798-799; see also *Chandler* v. *Roudebush*, *supra*, 425 U.S. at 853, 863. This observation reflects no discredit upon the remedy provided by New York, but rests upon the fact that the procedures provided by New York were not designed,

and are not adequate, to provide a final determination of federal rights under Title VII.[21] Compare *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 58. For essentially the same reasons, the Court in *Gardner-Denver Co.* squarely rejected application of "the doctrines of res judicata and collateral estoppel" in the context of Title VII. *Id.* at 49 n.10. That conclusion controls this case.

We acknowledge, of course, that the decision of the NYSHRD may be admitted in evidence in federal court proceedings and given appropriate weight, *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 60 & n.21; *Chandler* v. *Roudebush*, *supra*, 425 U.S. at 863 n.39. But given the extraordinarily sparse statement of the conclusions of the NYSHRD, and the limited procedures upon which they are based, little weight could be assigned to the state administrative decision as evidence. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 60 n.21. In these circumstances, it would be an anomaly to hold that these same bare conclusions deprive petitioner of all right to a federal court adjudication.[22]

Moreover, the unique policy of Title VII, which, as explained above, conferred a right to de novo adjudication in federal court notwithstanding prior proceedings, constitutes a congressional directive which overrides the general rules of res judicata and collateral estoppel.

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[21] Title VII and state law may, of course, differ substantively as well as procedurally. See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

[22] In contrast to this Court's decision in *Montana* v. *United States*, *supra*, 440 U.S. at 164 n.11, the Second Circuit has treated the adequacy of state procedures afforded to a complainant in a particular proceeding as irrelevant to the applicability of the preclusion doctrines, explaining that the "doctrine of res judicata does not depend on whether the prior judgment was free from error." *Mitchell* v. *National Broadcasting Co.*, *supra*, 553 F.2d at 271-272 (citations omitted). But examination of the adequacy of the state procedures on which the prior decision rests to determine whether further litigation is permissible does not amount to reconsideration of the merits of the claim.

Title VII is, in this respect, to be distinguished from 42 U.S.C. (& Supp. III) 1983. In *Allen* v. *McCurry*, *supra*, slip op. 10, the Court concluded that in enacting Section 1983 "Congress was acting in a way thoroughly consistent with the doctrines of preclusion." Title VII, on the other hand, has repeatedly been held to embody a special policy permitting trial de novo, even where the issues have been considered in another forum. *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S. at 64-65, 67-68; *Chandler* v. *Roudebush*, *supra*; *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 45, 47-49 & n.10; see also *Johnson* v. *Railway Express Agency*, *supra*, 421 U.S. at 459; *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 764 (1979).

The purposes of 28 U.S.C. 1738 would not be frustrated by permitting petitioner to have a trial de novo in federal district court on his Title VII claims. The state's interest in the conclusive resolution of disputes within its jurisdiction is served by according full faith and credit to the state court's final determination of petitioner's state law claims without precluding litigation of his Title VII claim in federal court. The state's requirement that petitioner make an election of forums (see note 19, *supra*) is not disturbed by allowing petitioner to litigate his Title VII claim in federal district court. And the only issues that could be raised in the Appellate Division's proceedings—whether the NYSHRD's decision was arbitrary or capricious or unsupported by sufficient evidence—are not in issue in federal court under Title VII at all.[23] Thus, the state court's decision that the

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[23] This case may accordingly be viewed as not implicating the question whether preclusive effect need be given to state court determinations at all. Cf. *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 281-282 (1980) (opinion of Stevens, J.). To invoke the preclusion doctrine in the circumstances of this case is, in reality, to give effect to a decision of the state administrative agency, which, in conformity with the New York statute, made the only factual determination in the state proceedings. 28 U.S.C. 1738

state agency's action was not improper, is not collaterally attacked by petitioner's litigation in federal district court on the merits of his federal claims. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 54.

Nor would the interests of comity between state and federal courts be furthered by a holding that a judgment of a state appellate court, reviewing a state agency's action on petitioner's state law claims, may have preclusive effect on petitioner's litigation of his federal claims in federal court. The predictable result of such a holding would be that any reasonably informed complainant would forgo his right to limited judicial review of the state agency's action on state law claims in order to ensure a trial de novo in federal court on his Title VII claims. See *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S. at 66 n.6; *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 59; compare *Allen* v. *McCurry*, *supra*, slip op. 14 n.23. Furthermore, Title VII complainants might withdraw from state agency proceedings altogether, after the statutory 60-day period, in order to avoid an agency determination in their favor which could then be appealed to the state courts. These consequences would frustrate Congress' intent that discrimination claims be resolved, where possible, on the state or local level. *New York Gaslight Club, Inc.* v. *Carey*, *supra*, 447 U.S. at 65, 66 n.6.

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does not require that preclusive effect be given to state agency decisions, however. While an administrative agency adjudication may, in proper circumstances, be given preclusive effect under the judicial doctrines of preclusion, *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966), such circumstances are not present here, for the reasons we have discussed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

JOSHUA I. SCHWARTZ
Assistant to the Solicitor General

CONSTANCE L. DUPRE
Acting General Counsel

PHILIP B. SKLOVER
Acting Associate General Counsel

VINCENT BLACKWOOD
Assistant General Counsel

SANDRA G. BRYAN
MARK S. FLYNN
Attorneys

Equal Employment Opportunity Commission

AUGUST 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 352881 601